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In The

Supreme Court of the United States

OCTOBER TERM, 1960

No 651

RICHARD G. BAILEY, NORMAN R. EGGIMANN,
LAUREL MACY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Richard C. Bailey, Norman R. Eggimann and Laurel Macy pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on August 24, 1960.

OPINIONS BELOW

The District Court gave no opinion. The Court of Appeals filed an opinion on August 24, 1960, reported at 282 F2d 421. Appendix A.

Substantially the same matter was tried twice in the Circuit Court of Oregon, appealed to the Supreme

Court of Oregon and subsequently dismissed in the Circuit Court. The Circuit Court gave no opinion. The Supreme Court opinion is reported at 208 Or 321, 300 P2d 975. Appendix B.

Bankruptcy proceedings were had in the U. S. District Court both in Oregon and in the Northern District of California, Southern Division, concerning these matters, but no opinions rendered.

Civil action subsequently brought against several of the indictees was dismissed on the merits in the United States District Court, Northern District of California, Southern Division. This court gave an opinion which has not been reported. Appendix C.

JURISDICTION

The judgment of the U. S. Court of Appeals for the Ninth Circuit was entered on August 24, 1960. After timely petition for rehearing, order was entered on November 21, 1960, denying rehearing as to petitioner Bailey and, on December 16, 1960, order was entered denying rehearing as to petitioners Macy and Eggimann. On December 13, 1960, order of Mr. Justice Douglas was made and entered extending petitioner Bailey's time within which to petition for certiorari to and including January 20, 1961.

The jurisdiction of this Court is invoked under 28 USCA 1254 (1) and Rule 22(2).

QUESTIONS PRESENTED

1. May convictions be upheld under the "harmless error" statute where the court reporter deliberately omitted to transcribe legal discussions between court and counsel during the trial when the appellate court relies for affirmance on the absence of such matter from the record?

2. May a person be found guilty of mail fraud and conspiracy by virtue of the "principals and accessories" statute if his acts would not have made him either a principal or an accessory before the fact at common law?

3. May the trial court refuse to instruct that a defendant cannot call co-defendants as witnesses in his behalf and may it then prevent defense counsel from arguing the absence of any inference therefrom?

STATUTES INVOLVED

The statutes involved are *28 USCA 753*, Reporters; *18 USCA 2*, Principals; *28 USCA 2111*, Harmless error; *18 USCA*, Conspiracy; and *18 USCA 1341*, Mail fraud. They are printed in Appendix D.

STATEMENT

Jurisdiction of the U. S. District Court for Oregon was invoked under *18 USCA 3231*. The indictment charged twenty-six counts of mail fraud and one count of conspiracy against the six principal employees of the Bailey Lumber Company and two of the customers. It alleged three banks were defrauded by the practice

of borrowing money on invoices and memorandum copies of bills of lading assigned to the banks which on their face falsely showed lumber had already been shipped to customers. Ext. Vol. I, VI & VII, p. 1.

The proof showed the documents did not on their face purport lumber had been shipped but evidence of oral representations and understanding by the banks was held not a fatal variance. (Appendix A, p. 17.) All the contracts were legitimate (Vol. II, p. 101, 139, 170) and many filled and the bank paid, but occasionally, customers would pay the bank without receiving lumber and Bailey Lumber Company would reimburse them in order to conceal the practice from the banks (Vol. II, p. 30-32; Vol. III, p. 550-551, 557, 558).

Three of the employees pleaded guilty, were given probation and testified for the government (Vol. II, p. 3-21). Before the close of the government's case, on arrangement with the government, the court acquitted the two customers (Vol. II, p. 253-260) and they were witnesses for the government (Vol. II, p. 585-596). This left Richard Bailey, president of the company, Norman Eggimann, CPA for the company, and Laurel Macy, the company's bookkeeper, on trial. The case was established by direct evidence of interested witnesses. cf. Appendix B.

Eggimann and Macy rested on the government's case, admitting they knew what was going on but denying any criminal act. Vol. IV, p. 636-644; Vol. V, p. 967, 968. Eggimann recorded the transactions, both honest

and fraudulent, in a proper accounting manner. Vol. III, p. 347. (The statement, Appendix A, p. 15, that he continued to sign notes and checks in blank after learning of the fraud, is not borne out by the record. The evidence only shows such blank notes and checks were *used* thereafter.) Macy made out documents, some of which were used in the fraud, and entries according to instructions of the office manager. Appendix A, p. 15.

Bailey denied knowledge of, or participation in, the scheme, and took the witness stand in his own defense. Vol. IV, p. 761 et seq.

Certain procedural problems developed. The trial judge fixed a day certain on which the trial had to end to enable him to take a plane trip, and the jury after two days of deliberation returned guilty verdicts on that day. Defense counsel, who was new to the case, protested exhaustion by the pace of the trial, inability to speak to out-of-town witnesses before putting them on the stand, and other obstructions to the defense, examples of which were that any slight failure was the occasion for terminating evidence on the point, and protest was stifled by a threat to use the power to comment; the Jencks statute was enforced for State records, and the U. S. Attorney and the trial judge cut down defense access to these records, even though the State officials were in no way protesting; consent to misleading instructions to the jury on extent of impeachment was obtained from the defense to prevent complete exclusion; and the Court's extension to former testi-

mony of the discredited rule in the Queen's case for written instruments, thus hindering the Constitutionally protected right to cross-examination by requiring defense counsel to warn an adverse witness of the purpose of his questions. Extract Vol. I, VI and VII, p. 25, 26, 41, 46, 48, 68, 71, 73; Vol. II, p. 86, 107; Vol. III, p. 302, 325, 375, 595; Vol. IV, p. 635, 636, 644, 645, 656, 669, 670, 672, 751; Vol. V, p. 670-677, 779, 808-811, 843, 844, 862, 863, 865-872, 903-909, 910-913, 931, 932, 934, 964, 970A; Supp. Tr. p. 18-20, 38.

The only employee witnesses left to Bailey were his co-defendants and one Noyes, who was deceased. Offer of testimony of Macy and Noyes in the Bankruptcy Court as exceptions to the hearsay rule was rejected. Vol. IV, p. 650; Vol. V, p. 873-877. Bailey's counsel requested the court instruct the jury he could not call Macy and Eggimann as witnesses so no inference should be drawn against him for this. The court refused and forbid defense counsel from arguing to the jury against such inference. Extract Vol. I, VI and VII, p. 73, 74, 47. The court merely instructed a defendant need not take the stand and no inference could be drawn therefrom. Vol. V, p. 1001, 1024. The government admits an inference unfavorable to Bailey resulted from his failure to call Macy and Eggimann. Gov't Br. Ct. of Appeals, p. 34.

The problems were complicated by the discovery that the court reporter omitted discussions between court and counsel on matters of law. Supp. Tr. p. 46. By order of the Court of Appeals the District Court held

hearing thereon. The District Court and Court of Appeals placed the burden on petitioners of showing the omitted matter was prejudicial to their appeal. Supp. Tr., p. 38; Appendix A, p. 23. Since no one knows what was actually omitted (Supp. Tr. p. 1-46), petitoners were unable to sustain that burden and, therefore, both courts ruled nothing prejudicial was omitted.

The Court of Appeals affirmed the convictions essentially because the record omitted matters necessary to show either error or substantial error (Appendix A), although this was the type of material the court reporter omitted. Supp. Tr., p. 1-46.

REASONS FOR GRANTING THE WRIT

1. Since an appellant of necessity must rely on the official court reporter to record completely a criminal case, it is unfair to require him to show what the reporter omitted and that the omission actually prejudiced his appeal. It should be enough to show there are unknown omissions which could have prejudiced his appeal. *Kotteakos v. U. S.*, 328 U.S. 750, 760-765; 90 L. ed. 1557, 1564-1567; 60 S. Ct. 1239, 1245-1248.

Here the Court of Appeals decided many close questions of law, affirming on the ground that the record either failed to show error particularly pointed out to the trial court or failed to show that the error was prejudicial. Appendix A. Since this was exactly the type of material that the reporter omitted, petitioners believe this of itself shows enough for reversal, for the

harmless error rule requires the whole record. *McCandless v. U. S.*, 298 U.S. 342, 348; 90 L. ed. 1205, 1209; 56 S. Ct. 764, 766.

No appellant is safe if he cannot rely on the statute providing for a complete record. *28 USCA 753.* Here is the deliberate act of a Federal officer violating the express command of Congress designed to prevent exactly what has occurred, *1944 U. S. Code Congressional Service 938, 939.*

2. Since the gist of mail fraud is the mailing, Macy and Eggimann would have had to be present at or near the mailing to be common law principals or, if absent, must have "incited, procured, counseled, commanded, or abetted (encouraged)" the actual perpetrator to be common law accessories before the fact. 1 Chitty, Criminal Law (Riley's ed.), p. 210 et seq. They were neither present at the scene nor incited another to act. Appendix A; p. 15, 16.

As for the conspiracy count, the Court of Appeals found there was no "agreement" by them to commit mail fraud, Appendix A, p. 15, 16, which agreement is the gist of conspiracy, *Direct Sales Co. v. U. S.*, 319 U.S. 703, 713; 87 L. ed. 1674, 1682; 63 S. Ct. 1265, 1270, neither were they present at the meetings aiding the conspirators (the conspiracy here was established by direct evidence, Vol. II, p. 21, 195, 196), nor did they at any time "incite, encourage, etc.," any of the wrongdoers to conspire. Appendix A, p. 15, 16.

The Ninth Circuit rule here of guilt by "knowledgeable participation" broadens the "principals and accessories" statute, *18 USCA 2*, beyond the common law rule, *R. v. Taylor*, 13 Cox CC 68; *Rex v. Lomas*, 23 Cox CC 765, and appears in conflict with the Sixth Circuit. *Morei v. U. S.*, 6 Cir., 127 F2d 827, 830. Extension of criminality should not be lightly made, particularly where the Court of Appeals concedes it covers "a minor sort of involvement." Appendix A, p. 16.

3. Refusing a request to point out specifically to the jury that a defendant who takes the witness stand by law cannot call co-defendants who do not offer themselves as witnesses, and refusing to permit defense counsel to argue to the jury, that no inference should be drawn against the defendant thereby, Extract Vol. I, VI and VII, p. 73, 74, 47, is allowing the government to use the silence of one defendant as a weapon against the other.

Especially is this true where the government admits this inference will be drawn against this defendant (Govt. Br. Ct. of Appeals, p. 34), where such co-defendant's "confession" would appear to implicate him, Vol. IV, p. 611, 612, where they are tried jointly, and where he has not been permitted to use the exculpatory former testimony of any such persons as exceptions to the hearsay rule. Vol. IV, p. 650; Vol. V, p. 813-877.

The instruction given that a defendant need not testify and no inference should be drawn therefrom

would obviously not explain the true state of affairs. Vol. V, p. 1001.

4. All of the above matters appear fundamental in criminal law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD R. LONERGAN,
Counsel for petitioners.

Dated January 14, 1961.

APPENDIX A

Opinion of the U.S. Court of Appeals in Bailey et al v. U.S.A., by Merrill, Circuit Judge.

Appellants, following indictment and jury trial, were found guilty, on 26 counts, of the crime of mail fraud. 18 U.S.C. § 1341. They have consolidated their appeals from judgment of conviction and have assigned error in nine respects.

Appellants were among eight persons originally indicted in connection with the fraudulent scheme here involved. Three of those persons pleaded guilty. Two others were acquitted by court order during the course of trial. These three appellants remain. Appellant Bailey received a four-year sentence. Appellants Eggimann and Macy received six-month sentences upon one count. Upon the other 25 counts sentence was suspended and they were placed on probation for a period of three years, such probation to commence upon completion of the term of imprisonment.

The government's evidence showed that Bailey Lumber Company was a corporation operating a wholesale lumber business at Eugene, Oregon, of which Appellant Bailey was president and owner of approximately one-half of the capital stock. Until about June, 1953, the company purchased lumber from various mills and suppliers in the Eugene area and shipped the same by railroad to purchasers in California and other parts of the country.

Early in 1953, Appellant Bailey became interested in a mill located at Willow Creek, California. The Willow Creek Corporation was formed with Bailey serving as president and owning approximately one-half of the capital stock. By June, 1953, Bailey Lumber Company was dealing almost exclusively with Willow Creek as a supplier. A drop in the price of lumber and a decision to rebuild and rehabilitate the Willow Creek mill resulted in a substantial drain upon Bailey's financial resources.

To faciliatate its operations, Bailey Lumber had in 1950 opened a lumber line of credit with The First National Bank in Eugene. The bank agreed to lend the company 80% of the face value of invoices on loads of lumber which the company had actually shipped to customers. At no time did the bank agree to lend on unshipped orders for lumber.

When this line of credit had originally been established, the company practice was to ship by railroad in carload lots. The bank, under this practice, received not only the original invoices but also copies of the railroad bills of lading as evidence of the fact of shipment. The company practice later changed to shipment by truck and the bank at first accepted only the invoice. In March, 1953, the bank instituted the requirement that after each loan the company furnish a memorandum bill of lading or trucker's receipt with reference to such shipment. In September, 1953, the bank instituted the requirement that the bill of lading must accompany the

invoice and be in the hands of the bank at the time the loan was made.

Due to the circumstances already mentioned, the lumber company at this time was dependent upon bank credit for its continued operations. It had ample orders but insufficient funds for producing the lumber with which to fill those orders. The scheme which the government's evidence established was one whereby the bank loans, unknown to the bank, would be obtained in advance of shipment so that the funds thus secured could be used to produce the lumber for such shipment. Until the bank requirement of a memorandum bill of lading became effective, the scheme was carried out by presenting invoices on unfilled orders. When the bank demanded proof of actual shipment, some further deception became necessary. The government produced testimony to the effect that Bailey and two other coconspirators hit upon the plan of presenting false bills of lading. This practice was inaugurated. By the latter part of 1953, it had developed into a volume operation.

The government's evidence disclosed that the procedure would normally commence with a request by Bailey at Willow Creek for funds to meet payrolls, construction costs or other needs at Willow Creek. The personnel at the Eugene office would then prepare the necessary fictitious invoices and false memorandum bills of lading for presentation at the bank with promissory notes for each invoice. The fictitious invoices were kept in a separate file in the Eugene office and a memoran-

dum slip representing each false invoice was kept on a spindle on the desk of the invoice clerk in Eugene. The fictitious sales were not taken up in the purchase and sale record of the company until such time (if at all) as the lumber was actually shipped.

This scheme was soon extended to apply not only to advance loans on actual shipments, but to cover loans in absence of any shipment whatsoever. In this respect the company involved itself in a type of kiting operation with loan number two providing the funds with which to meet loan number one. The company would secure a loan on fictitious invoice and bill of lading. With this sum it would send a check to a customer requesting that customer to send its check to the bank to pay off an earlier loan on a specified invoice. The bank was thus kept unaware of the fact that the earlier loan had related to no sale or shipment whatsoever.

In December, 1953, a new lumber line of credit was established at the Douglas County State Bank at Roseburg, Oregon. Within three weeks 80 invoices were presented to this bank, upon which approximately $60,000.00 was borrowed. No lumber was ever shipped on any of these invoices.

On January 10, 1954, a similar line of credit was established with the Bank of California in Portland. Within a week $55,000.00 was borrowed. Approximately $50,000.00 covered invoices upon which no lumber was shipped.

On January 15, 1954, the banks learned of the fraud. Outstanding loans based upon fictitious instruments then aggregated approximately $250,000.00.

In the District Court the defense of each appellant in substance was that he had not participated in the fraudulent scheme. Upon this appeal, as the first assignment of error, each contends that the record is devoid of substantial evidence of participation.

As to Bailey the evidence of participation is overwhelming. Many witnesses testified that he was the actual operator of the lumber company and fully cognizant of the procedures being followed.

Appellant Eggimann had worked for the lumber company as bookkeeper and accountant until January, 1953. Thereafter, as public accountant, he had continued to handle company books in various respects. He admitted having knowledge of the fictitious invoice practice as early as July, 1953. As to his participation there is evidence that he set up the clearing account in the ledger to handle the exchange of checks with customers by which matured invoices were picked up. On behalf of the company and with knowledge of the fraudulent scheme, he continued to sign promissory notes to the bank to accompany invoices. He continued to sign checks in blank on behalf of the company, some of which were used in the exchange-of-check practice. While his involvement does not appear to be of a very high level, there is ample evidence of participation.

Appellant Macy was the bookeeper at the company office in Eugene. On many occasions she received telephone calls from Bailey at Willow Creek requesting funds. She would then confer with Bailey's brother (one of the defendants who pleaded guilty) as to the number of false invoices necessary to raise the fund. She participated in the preparation of the false invoices and bills of lading and other papers presented to the bank. She made the entries in the sales record, entering only those of shipments actually made. She prepared the checks used in the exchange-of-checks maneuver and the day-to-day records covering these transactions. As with Eggimann, hers was a minor sort of involvement but the evidence of knowledgeable participation is ample.

Appellants assert failure of proof of the fact that lumber covered by invoice and bill of lading was not shipped. They state that the proof was confined to the fact of non-delivery which, it was shown, could have resulted from any one of a number of innocent causes. This contention we must reject. In view of the extensive testimony concerning the presentation of invoices and bills of lading representing lumber not shipped and the total number of non-receipts, the fact that some non-receipts were explainable does not suffice to take the question of non-shipment from the jury.

We conclude that the verdict, as to each appellant, is supported by substantial evidence.

Upon their second assignment of error, appellants contend that the case against them exceeded the scope of the indictment under which they were charged in that the indictment charges fraud by written instrument while the proof was directed to fraud by oral representation.

The indictments charged that "as a part of said scheme and artifice" defendants prepared (1) false invoices "purporting" to represent accounts receivable to the company and lumber shipments from the Willow Creek company to the consignees and (2) false memoranda of bills of lading "purporting" to be signed by representatives of carriers and to evidence actual shipments of lumber.

Appellants contend that the word "purport" has a technical meaning and is limited to that which is apparent on the face of the instrument; that neither invoices nor bills of lading upon their face could be read as representations that lumber had been shipped to any consignee other than the company itself. Only through testimony as to conversations and oral agreements or understandings with the banks, they assert, could any representation be found that the documents in question covered actual shipments to purchasing consignees. Appellants thus contend, in effect, that the proof went to a crime other than the one with which they had been charged.

We regard this contention as without merit. The indictment charged the defendants with a "scheme and

artifice to defraud certain banks in the State of Oregon * * * by means of false and fraudulent *pretences, representations* and documents, said defendants then and there well knowing that the said *pretences, representations* and documents were false when made." (Emphasis supplied.) The banks insisted upon evidence of lumber shipments as a condition to credit. The invoices and bills of lading were submitted to them as such evidence with the intent that the banks accept them as such. They were accepted as such. That the instruments upon their face may have fallen short of establishing actual shipments to the named consignees does not destroy their "purport" under the circumstances in which they were delivered to the banks. Technical deficiences in the instruments upon which the banks relied do not in any material respect vary the nature of the fraudulent scheme charged and proved to have existed. In the light of the broad scheme charged in the indictment, we have little doubt that appellants had notice of that which was proved and did not themselves so limit the meaning of the word "purport." See Kotteakos vs. United States, 1945, 328 U.S. 750; Berger vs. United States, 1935, 295 U.S. 78.

We conclude that proof did not depart from the charge of the indictment.

The third assignment of error relates to Bailey. He contends that the court improperly admitted evidence of an admission made by Appellant Macy which impli-

cated Bailey without instructing the jury that such admission might not be used against him.

With reference to this admission, counsel for the government on two occasions in the presence of the jury advised the court that the statement was offered solely as an admission against Macy. The court advised the jury that it was only admissible as against Macy. In its instructions the court dealt with the extent to which a co-conspirator's admissions may be used against fellow conspirators. No different instructions were requested by Bailey. Accordingly, we conclude that this assignment is without merit.

The fourth assignment also relates to Bailey. He contends that the court improperly rejected evidence bearing upon lack of motive. He offered testimony that one Gleason, a man of wealth, was willing to advance money to Bailey "on the strength of his projects." Bailey contends that this would have demonstrated that he had no motive for engaging in the fraudulent scheme. The evidence was rejected by the court.

The offer of proof was not clear as to whether Gleason was willing to advance money without security. Unless he was, we fail to see the materiality of this evidence. Assuming that he was and that the evidence was material as bearing on motive, any error in excluding it must be regarded as harmless. In the light of the extensive evidence of Bailey's actual knowledge and participation, the question of why he should have felt impelled to

engage in such a scheme becomes relatively inconsequential.[1]

The fifth assignment of error relates to the refusal of the court to admit in evidence, under exception to the hearsay rule, declarations made by two persons during the course of Bailey Lumber Company's bankruptcy proceedings.

For such evidence to be admissible it must appear that the prior proceedings involved substantially identical issues and parties and that cross-examination was available to the adverse party in the instant case. 5 Wigmore, Evidence, 1386 (3rd Ed., 1940). Such showing has not been made. The issues with which the referee in bankruptcy was concerned were far different from those facing the District Court in this criminal action. The United States was only a claimant in the bankruptcy proceeding and there is no showing of occasion to cross-examine the persons in question. The referee cannot be considered a government representative.

Appellants assert that the testimony in question was admissible as declarations against interest. There is no showing that the offered testimony was against the interests of the witnesses save in one possible respect. Appellant Macy, as a witness, testified as follows: "Q. You employees then in Bailey Lumber Company unbe-

[1]Upon this (and other assignments of error subsequently discussed) Kotteakos vs. United States, supra, is enlightening. At page 764 the Supreme Court states: "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific commaad of Congress."

knownst to Dick Bailey volunteered your services in forging these bills of lading and creating these invoices? A. As far as I know it was without his knowledge."

Conceding, arguendo, that the implied admission of a civil liability was sufficient to render Macy's answer a declaration against interest and admissible, we regard the error as harmless. The fact that one of the many persons involved could not of her own knowledge connect Bailey with the scheme is of little import in the light of testimony of nine other witnesses relative to his knowledge and participation.

The sixth assignment of error relates to the extent to which a deposition was admitted in evidence. Appellants offered the deposition for purposes of impeachment. It was admitted in its entirety and thereafter, as an exhibit, given in its entirety to the jury. Appellants contend that it was only offered to the extent of specific contradictory statements and that to place the entire deposition in evidence and in the hands of the jury was prejudicial.

Under the circumstances in which the deposition was offered in evidence and later given to the jury as an exhibit, we are satisfied that appellants did not make their position clear to the District Court. Moreover, the allegedly prejudicial parts of the deposition are in a minor fashion merely cumulative of other testimony. We find no prejudice in the fact that they were made available to the jury.

The seventh assignment of error is advanced by Bailey alone. Appellants Eggimann and Macy elected not to take the witness stand. Their testimony was therefore not available to Bailey. He asserts error in the refusal of the District Court to instruct the jury that Bailey could not call these defendants as witnesses in his behalf.

While such an instruction might have benefited Bailey, it might also have been regarded as prejudicial comment, adverse to his co-defendants, upon their failure to testify.

We are not here concerned with "the right of an accused to insist on a privilege which Congress has given him." Bruno vs. United States, 1939, 308 U.S. 287, 294. Rather, our concern is with the weighing of the possible benefit to be gained by Bailey from the requested instruction against the possible detriment to Eggimann and Macy. The District Court did instruct the jury that the law does not compel a defendant to take the witness stand and testify and that no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify. This instruction in general terms reached the same result sought by Bailey and it could perhaps have been made to apply even more clearly without constituting comment in itself. We find neither error nor abuse of discretion in rejecting the requested instruction under the circumstances.

The eighth assignment relates to the state of the reporter's transcript. It appears that while the transcript is complete as to the trial proceedings, certain matters of legal argument and colloquy were omitted by the reporter. This point was presented to this court last year upon a motion by appellants and resulted in an order, August 8, 1959, directing the District Court to ascertain, upon hearing, the extent to which the transcript was incomplete. Hearings were had and the District Court has determined that nothing had been omitted which related to the points upon which the appellants intended to rely upon appeal. There is nothing in the record which suggests that this determination was erroneous or that appellants have suffered prejudice by any omission.

Finally, appellants assert abuse of discretion in that the trial was set and conducted with undue haste. Appellants' trial counsel came into the case shortly before trial. A continuance was refused. During the course of the trial, counsel on occasion requested and was refused recess for the purpose of discussing with newly arrived witnesses the testimony they were about to give. Other instances are mentioned of what appellants regard as undue haste or impatience on the part of the court.

We find no abuse of discretion in the court's refusal to tolerate what it regarded as unnecessary delay. At the time of substitution of counsel, when appellants' trial counsel first entered the case, the court made it clear

that no substitution would be permitted if it would result in any delay or continuance. The court was assured that there would be no such result.

Affirmed.

APPENDIX B

Opinion of the Oregon Supreme Court in State v. Bailey, by Rossman, Justice.

This is an appeal by the defendant, Richard G. Bailey, from a judgment of the circuit court which adjudged him guilty of the crime of conspiring with his brother, Alfred P. Bailey, "to commit the crime of obtaining money under false pretenses" from the First National Bank of Eugene.

ORS 161.320 provides:

> "If two or more persons conspire to commit any felony defined and made punishable by the laws of this state and one or more of the parties does any act to effect the object of the conspiracy, each of the parties to the conspiracy, upon conviction, shall be punished * * *."

The indictment charged that September 1, 1953, when the defendant was an officer of a concern entitled Bailey Lumber Company, he and his brother, Alfred P. Bailey, conspired to obtain money falsely for the Bailey Lumber Company in the following manner:

> "* * * by pretending to the said bank that lumber had been shipped from the Willow Creek Lumber Company of Willow Creek, California, to certain purchasers, and by presenting to the said bank certain false tokens, to-wit: certain false documents purporting to be valid memorandums of bills of lading for lumber shipped and certain false documents purporting to be valid invoices for lumber shipped, to effect a loan to the said Bailey Lumber Company from the said bank upon the purported

memorandums and invoices, and to effect the object of the said conspiracy, the said conspirators did the following acts, to-wit:

"1. The said conspirators did cause to be presented to the Main Branch of the First National Bank of Eugene, Oregon, on the 16th day of December, 1953, certain false documents, to-wit: a false document purporting to be a valid memorandum of a bill of lading, shipper's no. 3086D, issued by the Willow Creek Lumber Company of Willow Creek, California, of a purported lumber shipment consigned to Hill & Morton, Incorporated, of Cutten, California, on December 12, 1953, and a false document purporting to be a valid invoice of Bailey Lumber Company, Incorporated, No. 12-12-3086D, dated December 16, 1953, covering the said purported shipment of lumber to Hill & Morton, Incorporated, as aforesaid."

The part of the indictment just quoted which is preceded with the numeral 1 is succeeded by 13 other paragraphs each of which alleges a transaction similar to the one which the quoted paragraph describes.

Thus, the indictment charges that the defendant and his brother Alfred conspired to deceive the First National Bank of Eugene into making loans of money to the Bailey Lumber Company by presenting to the bank as security for each loan which they sought two false documents: (1) a false invoice which purported to represent lumber produced by the Willow Creek Lumber Company and sold by the Bailey Lumber Company to one of its customers, and (2) a false bill of lading which appeared to represent the same nonexistent lumber.

The appellant's brief submits 13 assignments of error. We will presently set forth our analysis of two of them, the second and the third. The two are controlled by the same principal of law. The Second assignment of error challenges a ruling which occurred during the recross-examination of one Paul W. Cunningham, a witness for the state. The third attacks a ruling which was made during the cross-examination of one Harold W. Eldridge, another witness for the state. The instructions to the jury dealt with Cunningham and Eldridge as accomplices, and we believe that the state concedes that the two men were accomplices of the defendant, in the event that the latter committed the crime mentioned in the indictment. Before quoting the two assignments of error we explain that Messrs. Rodman and Tooze, who are mentioned in them, are counsel for the defendant. Mr. Venn, who is also mentioned in the quoted passages, is the district attorney for Lane County and Mr. Cottrell is his deputy.

The following is the second assignment of error:

"The Court on re-cross examination of witness Paul W. Cunningham erred in sustaining plaintiff's objection to the following question:

'By Mr. Rodman:

'Q Mr. Cunningham, has any criminal charge been filed against you at any time?

'Mr. Cottrell: Your Honor, I object to that as being irrelevant.

'The Court: Objection sustained. It has no bearing on this case.

'Mr. Rodman: It is to show bias or motive.

'The Court: Objection is sustained.

'Mr. Rodman: Yes, Your Honor.

'Mr. Venn: No further questions.

'Mr. Rodman: May it please the Court, can we make an offer of proof in connection with that last?

'The Court: No, you have the ruling of the Court. We won't have any speeches to the jury. That is the record, when the Court rules on your question.'"

The third assignment of error follows:

"The Court on cross examination of witness Harold W. Eldridge erred in sustaining plaintiff's objection to the following question:

'By Mr. Tooze:

'Q Have you ever been prosecuted in connection with the Bailey Lumber Company affairs?

'Mr. Cottrell: Objection, Your Honor.

'The Court: Objection is sustained.'"

We will now take note of evidence which shows the manner in which the fraudulent practice started and of other evidence which indicates whether or not the defendant had knowledge of it. The Bailey Lumber Company, located in Eugene, was a wholesale lumber dealer. The defendant was its president and owned 49 per cent of its capital stock. His brother Alfred was an employe of the company as were also Eldridge and Cunningham. None of them had a financial interest in the company.

At Willow Creek, which is in Northern California, someone had built a small sawmill prior to 1952 to which the Bailey Lumber Company made a loan. In the early part of 1952 when payment of the loan defaulted, the defendant and two others organized the Willow Creek Lumber Company which is mentioned in the indictment. The defendant became the owner of 48 per cent of its capital stock and the two others purchased the rest. The corporation acquired ownership of the mill. The defendant described Willow Creek mill as "an inefficient mill." Presently he undertook for the plant an extensive program of modernization and expansion with the view of increasing its output. The program proved costly. The state's brief declares: "By the fall of 1953 the defendant had personally invested between $250,000 to $350,000" in the Willow Creek mill. The defendant at that time was 34 years of age and had secured his means through his own enterprise. By August of 1953 the construction program had strained the defendant's financial resources severely. The next month or so the Bailey Lumber Company was forced to ask some of its creditors to be patient.

The undertaking to increase the mill's output met with unexpected obstacles. The contracting concern which had been given charge of the undertaking proved incapable and had to be removed. In August and again in September, 1953, forest fires broke out in the mill's vicinity and upon both occasions the Forestry Service impressed the crew of the mill into fire fighting, with

the result that manufacturing operations were forced to suspend. At other times production ceased due to the reconstruction work which was underway or because of breakdowns in machinery. The repetition of shutdowns materially diminished the output of the mill and its income. Several declines in the market price of the mill's product heightened the difficulties. The mill's products were studdings and crossarms. Studding declined from $65 to below $50. The succession of shutdowns and the severe decrease in market price curtailed the income of the Bailey Lumber Company so badly that it had but little money with which it could buy lumber for resale. Thereby it was forced to confine its activities largely to the product of the Willow Creek mill, which, as we have seen, was studdings and crossarms.

Prior to August of 1953 the defendant had spent virtually all of his time in the office of the Bailey Lumber Company. A mill superintendent and other administrative employes had charge of operations at Willow Creek. By August of 1953 the unfavorable conditions resulting from repeated shutdowns, curtailed production and low market price caused the defendant to devote most of his time to Willow Creek. He was resolved to increase output and curtail expenses. When he began to give the major part of his time to the Willow Creek mill, his brother Alfred assumed charge of the office of the Bailey Lumber Company. The defendant worked long hours at Willow Creek in his

efforts to complete the modernization which the contractor had left unfinished, to increase the volume of output and reduce production costs. The state's brief gives this description of his labors:

> "Though still, at least nominally, President of both corporations, he labored with the millwright's crew, assisted in making repairs, worked at several stations in the mill, repaired roads and assisted in the installation of electrical equipment."

He lived in a trailer immediately back of the mill, and estimated that he was on duty sixteen hours per day. It will be observed that he devoted his efforts to the mill rather than to the office.

The defendant was in the Bailey Lumber Company's office for no more than one third of September. Ten days or less represented the time which he spent there in October. In November he was in Eugene for a maximum of five days and was there for an even briefer period in December.

In 1950, when the Bailey Lumber Company began operations, it adopted a practice of borrowing money from the First National Bank of Eugene of which it is necessary to take note. When it sold a truckload of lumber (truck and trailer) it prepared a paper known as an invoice. The latter listed the lumber and the price charged the customer. Then the company assigned the invoice to the bank as security for a loan which amounted to 80 per cent of the invoice price. The loan was repayable in 60 days. The bank set

$250,000 as the maximum for outstanding indebtedness at any one time. The bank mailed the assigned invoice to the customer and thereby effected collection. The amount of the loan averaged $700. By the fall of 1953 the total borrowings aggregated over six million dollars.

When the defendant began to spend most of his time at Willow Creek, the loan transactions were handled by Alfred Bailey and the other two individuals whom we have mentioned, Eldridge and Cunningham. The defendant, however, in anticipation of borrowings, signed from time to time pads of blank notes which he entrusted to the three men. Cunningham, as a witness for the state, described himself as invoice clerk. He prepared most of the invoices, typed the notes and prepared the necessary deposit slips. Generally, he was the individual who took the papers to the bank and obtained the loans. Eldridge, who characterized himself as the sales manager, often helped Cunningham with the work we just described.

We have mentioned the period of idleness which the August forest fire imposed upon the Willow Creek mill and the resulting ill effect upon the income of the Bailey Lumber Company. Due to the shutdown, the mill had produced no lumber for a number of days and, since the Forestry Service had preempted even the company's truck drivers, no lumber had moved out of Willow Creek. Presently, according to Alfred, the payroll had to be met but the Bailey Lumber Company's bank account was inadequate to the need. Thereupon Alfred,

so he swore, consulted the defendant, who recommended that he telephone to the firm of Middleton & Bierne, customers of the Bailey Lumber Company, and request of them the privilege of invoicing the firm for ten or twelve truckloads in advance of shipment. The privilege was granted and in consequence the Bailey Lumber Company prepared the invoices, assigned them to the bank and obtained the desired loans. The bank was unaware that the invoices did not represent shipments which went forth concurrently with the preparation of the invoices. Later, when the truck drivers were available, the lumber left Willow Creek and the demands of the invoices were met. In September, as we have seen, another forest fire forced the mill to close. Upon that occasion Alfred again faced a payroll without the needed money. He once more requested of Middleton & Bierne the privilege of employing advance invoices. The privilege was again granted. The defendant denied that he told his brother to request of Middleton & Bierne the privilege of advance invoicing and swore that he was unaware of what had been done.

When the above transactions occurred, the Bailey Lumber Company submitted to the bank no false bills of lading. In fact, at that time the bank did not require that the invoices be accompanied with bills of lading or any copy of the latter.

Alfred testified that sometime in August the bank notified him and the defendant that no loans would thereafter be made upon invoices unless the latter were

accompanied by memorandums of the bills of lading showing that the lumber listed in the invoices had actually been placed into the carrier's custody for transportation. According to him, the demand precipitated a crisis for the company. Alfred explained that at that time the Bailey Lumber Company had little cash and that if a loan had to wait until a bill of lading came from Willow Creek to Eugene the Bailey Lumber Company would be embarrassed. The bank's demand was succeeded immediately by a conference in the Bailey Lumber Company office which was attended by him (Alfred), the defendant and Eldridge. We now quote from Alfred's testimony, but before doing so explain that when he speaks of Dick he means the defendant, Richard G. Bailey. He testified:

> "At that time, as I say, we were all pretty excited because we didn't have any money in the bank. I can't exactly remember the exact words, but it was to this effect, that we'd just about have to close down because we didn't have—well, normally speaking, we'd have a way—
>
> * * * * *
>
> "That if we'd have to wait for the invoices to arrive from Willow Creek that we wouldn't be able to meet our obligations. So, consequently, we'd have to come up with some idea or something to, No. 1, either speed the invoices or get them up here in a terrible hurry. And I was talking, and Hal Eldridge was talking and Dick was talking, and one of us at that time, and it possibly could have been myself, came up with the idea of putting on the invoices—actually we didn't call it a forged Bill of Lading and then replacing that false Bill of Lading

the moment the other one did arrive from Willow Creek.

"Q (By Mr. Ayrit) Now, was any statement made by Mr. Richard Bailey as to the length of time that transaction would continue?

"A Yes. Because at that time we were still a little bit in the hole due to that first fire. So, consequently he definitely made the statement, if we could come up with some practice that would just carry us over this period of time; and it would be a very short period of time that we would have to do it, so no one could possibly get hurt.

"Q Of your own knowledge, do you know how soon after that; that that practice started of attaching—

"A Within a day or two, because that was the whole reason why we were so nervous waiting in the office for the return."

In the above manner, according to Alfred, a practice was begun of forging memorandum bills of lading and of attaching the spurious instrument to the invoice. The conjoined document was then delivered to the bank in order to induce it to make the loan. There is no contention that the defendant prepared any of the false bills of lading or presented any of them to the bank. Likewise, no one argues that the defendant wrote any of the advance invoices or took any of them to the bank. We add that none of the instruments were prepared at Willow Creek.

The indictment speaks of a "memorandum of a bill of lading." In the fraudulent transactions no bill of

lading was actually presented to the bank. Bills of lading, when genuine, do not make their way to a bank but are for the carrier. The instrument which the bank requested was a memorandum of the bill of lading. The paper which the bank received was a copy of what purported to be a genuine bill of lading. It even bore what appeared to be a carbon copy of the truck driver's signature. The lumber mentioned in it was non-existent. The memorandum bills of lading, as also the advance invoices, were written by Alfred, Cunningham, Eldridge and an occasional other employe of the Bailey Lumber Company. It will be observed that Alfred swore that "within a day or two" after the bank's demand for the memorandum bills of lading he inaugurated the fraudulent course. In narrating the bank's demand, he testified that when he explained to the bank that immediate inauguration of the new program would subject the Bailey Lumber Company to the embarrassing inconvenience of having to wait for several days before any bill of lading could reach Eugene from Willow Creek, the bank's officials agreed that the lumber company would have "approximately two weeks" before being required to adopt the new practice.

The above describes the start of the practice whereby Alfred, Cunningham, Eldridge and an occasional other employee of the Eugene office forged memorandums of bills of lading which they attached to false invoices and thereby obtained loans of money from the bank for the Bailey Lumber Company. The practice, as we

have seen, was begun, according to Alfred, about the middle of August, 1953. It continued until January, 1954, when the fraud was discovered. At that time there was in the possession of the bank $172,000 of invoices. However, $22,000 of them were genuine; that is, they represented the sale and shipment of real lumber.

The defendant, as we will presently observe, testified that the bank did not make a demand that memorandums of the bills of lading must accompany the invoices until late in September or early October, 1953. As a witness, he did not dispute the testimony given by Alfred, Cunningham and Eldridge in which they described their course of forgery and falsification. He swore, however, that he had no knowledge of it until the bank discovered it and informed him on January 25, 1954.

Alfred conceded that he himself prepared some of the advance invoices and forged memorandums of bills of lading. He swore that Cunningham and Eldridge prepared many of them. Cunningham was the individual who generally took the conjoined documents to the bank and obtained the loans.

Cunningham acknowledged that he prepared many of the false documents. The following is taken from his testimony:

> "A Well, we had bought pads of Bills of Lading from downtown which had four copies on it or the original and three copies, and we would make—write the amount by hand showing the Willow Creek number and the Bailey Lumber Company

number, and the amount of footage, and the type of lumber, where the destination was, and who it was shipped by, and then the driver's name on it—signature as being picked up.

"Q Where was the signature obtained, the truck driver's signature?

"A It was usually copied, or traced, or just written down from an original Bill of Lading that was actually signed by a driver.

"Q Who instructed you to prepare these memorandums of Bills of Lading?

"A Al Bailey."

Eldridge gave the following testimony:

"Q Did you prepare any of these memorandums of Bills of Lading, Mr. Eldridge?

"A I did."

It will be observed that Cunningham even described the manner in which a signature which appeared to be that of a truck driver was affixed to the false bill of lading.

The defendant acknowledged that the bank told him and Alfred that it would no longer make loans upon the invoices alone and demanded that each invoice be accompanied with a memorandum of the bill of lading. He was positive, however, that the conference in which the bank made its demand did not occur in August but toward the end of September or in early October. He explained that he was certain of the day because at that time he was wearing a large brace for his back as the result of an injury which he had sustained. The

bank officials who testified recalled that in the course of the meeting, during which they made their demand, the defendant spoke of an injury. The appliance concern that made the brace submitted records at the trial which corroborated the defendant.

Concerning the request that the memorandum bills of lading be attached to the invoices, the defendant testified:

> "Well, at the bank meeting, the bank requested that the Bills of Lading—proof of shipment accompany the invoices and the notes at the time that they were discounted at the bank or presented to the bank, and I didn't see any particular hardship in that, and I turned to my brother and I asked him—said, 'Don't you think that will be all right? Do you see any reason?' He said, 'No, we can comply with that,' but he said, 'we have a payroll or logs or something coming due right away,' and he said, 'it would work a hardship on us if we had to put it into effect right immediately,' so the bank officials said that—oh, ten days or two weeks from that date that the practice would have to start, they would have to accompany it."

We have now described the manner in which the forged bills of lading were prepared and used. When the deception was discovered, Alfred assumed full responsibility and absolved the defendant. A few days later, when the defendant sought financing from a Mr. Walter M. Gleason, who owned a tract of timberland near the property of the Willow Creek Lumber Company, Alfred prepared a written statement which he handed to Mr. Gleason in which he affirmed that he

alone was responsible for the fraudulent papers and that no guilt was attributable to the defendant.

In quoting the second assignment of error we took note of the fact that when Cunningham was upon re-cross-examination, defendant's counsel asked him whether "any criminal charge" had been filed against him "at any time." The inquiry was not limited to the fraudulent transactions mentioned in the indictment. The state, as we have seen, objected to the question on the ground "irrelevant," and it was sustained with a ruling, "It has no bearing on this case." At that point defendant's counsel declared that his purpose was to reveal "bias or motive," but he did not rephrase his question so that it would serve that purpose. The third assignment of error, as we have seen, is based upon a question which defendant's counsel submitted to Eldridge during cross-examination and which asked "Have you ever been prosecuted in connection with the Bailey Lumber Company affairs?" An objection, which disclosed no grounds, was sustained.

It is evident that the defendant's purpose in asking Eldridge whether any criminal charges had been filed against him on account of his wrongdoings in the Bailey Lumber Company transactions was to uncover his bias, motive and interest. But the question propounded to Cunningham was not limited to Bailey Lumber Company matters and inquired in regard to criminal charges in general. It was not restricted to convictions. No error occurred when the objection was sustained to the ques-

tion which defendant's counsel submitted to Cunningham. ORS 45.600; *State v. Broom*, 121 Or 202, 253 P 1042, 253 P 1044; and Wigmore on Evidence, 3d ed, §§ 980(a) and 982.

Now we will confine ourselves to assignment of error three. Whether or not the defendant is guilty of the charge submitted by the indictment, Eldridge acknowledged that he committed the very crime which he attributed to the defendant. Whenever a witness concedes that he was an accomplice in the commission of a crime, his self-avouched wrongful conduct suggests that he may have an evil purpose or motive for turning against those whom he describes as his erstwhile confederates. A witness who admits that he wrote counterfeit documents, forged signatures and employed the instruments as the means of deceiving a bank into parting with its money, denounces himself. When the testimony of an accomplice is placed before a jury under a supposition that it may reflect the truth, the administration of justice demands that cross-examination should explore motive, bias and interest.

An accomplice has a powerful motive for currying favor with the prosecuting attorney. After he has revealed his criminal course of conduct to the police and the prosecuting attorney, his liberty is at their sufferance. Fears, whether warranted or not, that they will imprison him, publish his confession or cause his indictment may prompt him to make statements upon his own volition which he hopes will protect him. Sleepless

nights and a harrowed conscience tincture in his mind the facts with the false. Few have as great an incentive as he to lay the ultimate blame for the wrong which he committed upon another.

The courts, almost without exception, hold that a defendant is entitled to question an accomplice and a co-defendant in the very manner in which this defendant attempted when he was prevented by the trial judge's challenged ruling.

In *People v. Simard*, 314 Mich 624, 23 NW2d 106, the defendant had been adjudged guilty of the crime of procuring a miscarriage of a girl, 15 years of age. The boy's mother had taken the pregnant girl to the defendant for an abortion and had paid the defendant's fee. She testified for the state. On cross-examination she admitted that she knew that she was violating the law. When she was asked whether she had been arrested, an objection by the prosecutor was sustained. We now quote from the decision:

> "* * * This was error. Under the circumstances this information was pertinent to show the interest of the witness, as she was an accomplice, and her son was guilty of statutory rape. It is true that the prosecutor and police officer or their methods or discretion were not on trial, but the question of her credibility and her interest in the case became pertinent. In People v. Hare, 57 Mich. 505, 24 N.W. 843, 849, we said: 'The court refused to allow defendant to show the fact that no information had been filed against Billington. Billington was a confessed confederate and an accomplice. * * *. No conviction could have been had upon this record with-

out his testimony, * * *. It was not only proper, but it was the duty of counsel for the prisoner to place before the jury all the circumstances surrounding the witness upon the stand, as well as any fact which would have any reasonable tendency to affect his credibility; and the fact that he was not informed against for the crime he stood charged with, and that he was treated with the leniency usual in cases of informing accomplices who volunteer to give testimony against their confederates in crime, had its bearing upon his credibility, and we think the circuit judge erred in ruling otherwise.'"

In *People v: Andrae*, 295 Ill 445, 129 NE 178, the court, in speaking of an accomplice's testimony, said:

"* * * The jury should subject such testimony to careful examination in the light of all other evidence in the case and consider the influence under which the testimony is given and whether the purpose of the witness is to shield himself from punishment, to obtain some benefit for himself, or to gratify his malice. People v. McKinney, 267 Ill. 454, 108 N. E. 652. The credibility of Wadsworth was a question for the jury, and his testimony was to be carefully weighed in view of his character, his connection with the crime, and any motive that may have influenced him to offer himself as a witness in behalf of the prosecution to aid in the conviction of plaintiffs in error; * * *. The identity of plaintiffs in error with this crime depends wholly upon the testimony of Wadsworth, and they were entitled to show by the only means at hand—the cross-examination of this witness—what influence operated on his mind to cause him to testify on behalf of the people. The court erred in sustaining these objections."

State v. Pellett, 53 ND 183, 204 NW 983, was based upon a charge of grand larceny. The accomplice testified for the state. To a question as to whether he had been arrested, objections were sustained. In reversing, the court declared:

> "* * * It has been the law in this jurisdiction for over thirty years that great latitude should be allowed in the examination of an accomplice."

In *Sandroff v. United States*, 158 F2d 623, which was based upon a charge of conspiracy to violate price regulations, the cross-examination and rulings thereon took a course substantially the same as in the case before us. The court considered the matter at length and in so doing ruled:

> "* * * The two Ginns were the chief and indispensable Government witnesses in the prosecution of Sandroff and his company. In such circumstances, it was highly important that latitude be allowed in cross-examination to test their motives for testifying against Sandroff as bearing directly upon their credibility."

The judgment of conviction was reversed.

The leading case of *State v. Kent*, 4 ND 577, 62 NW 631, declares:

> "On cross-examination of the accomplice, Swedensky, counsel for the accused asked him whether he expected to be hung for his crime. This question being objected to by counsel for the state, the court sustained the objection. In this the court committed error. One who is on trial for his life should be allowed great latitude in the cross-examination of the witness who, by his own confession, can have

> no hope of escaping the death punishment save through the indulgence of those who, under the law, have his life in their hands. An accomplice, in such a case, in implicating another with him in guilt, is under the influence of the most powerful motive that can shape human conduct. * * * Even when the accomplice has nothing in the way of word or conduct from any one connected with the prosecution on which to build an assurance, he may have some expectation—leading all the way from a faint glimmer of hope to confident belief—that, if his testimony results in the conviction of another, he himself will reap some reward. One whose life he is swearing away has a right to discover, if he can, by the admission of the accomplice himself, that his testimony is given under a hope of life, which he cannot entertain unless he looks for indulgence. The accused has a right to have such fact laid before the jury on the question of the accomplice's credibility."

We shall resort to the decisions no further. Many to similar effect are cited in Wigmore on Evidence, 3d ed, §967, and McCormick on Evidence, p 84.

We are satisfied that the defendant was entitled to reveal to the jury the bias, motive and interest of the accomplices. But the state points to the fact that the ruling, which is the subject matter of assignment of error three, occurred upon cross-examination and argues that cross-examination is subject to the discretion of the trial judge. Its contention is well answered in *State v. Roberson*, 215 NC 784, 3 SE2d 277, which says:

> "Latitude is allowed in showing the bias, hostility, corruption, interest or misconduct with respect to the case or other facts tending to prove

that the testimony of the witness is unworthy of credit. * * *

"Cross-examination would be of little value if a witness could not be freely interrogated as to his motives, bias and interest, or as to his conduct as connected with the parties or the cause of action; * * *.

"For the purpose of affecting the credibility of a witness, he may be cross examined as to his interest in the event of the suit or the state of his feelings toward the respective parties, his conduct in connection with the cause of action or collateral facts which tend to show that he is prejudiced or interested. * * *

"The cross examiner is at liberty and is often compelled to attack the credibility of the witness and, for that purpose, must be allowed latitude in asking questions which would otherwise be irrelevant to the issue. For the purpose of testing the credibility of a witness, it is permissible to investigate the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, inclinations and prejudices, * * *.

"It bears against the credibility of a witness that he is an accomplice in the crime charged and testifies for the prosecution; and the pendency of an indictment against the witness indicates indirectly a similar possibility of his currying favor by testifying for the State; so, too, the existence of a promise or just expectation of pardon for his share as accomplice in the crime charged. 2 Wigmore on Evidence, 2nd Ed., 350.

"While latitude is allowed in showing the bias, hostility, corruption, prejudice and interest or misconduct of the witness with respect to the case or other facts tending to prove that his testimony is unworthy of credit, 3 Jones on Evidence, 1538, the question as to the extent to which cross examina-

tion may extend is to be determined with a view to the discretion of the trial judge. Nevertheless, if the latter has excluded testimony which would clearly show bias, interest, the promise, or the hope of reward on the part of the witness, it is error and may be ground for a new trial. Alford v. U. S., 282 U. S. 687, 51 S. Ct. 218, 75 L. Ed. 624; 3 Jones on Evidence, 1538. The discretionary power of the trial judge is to confine the cross-examination within reasonable limits. It does not include the authority to exclude altogether questions, and the answers thereto, which directly challenge the disinterestedness or credibility of the witness' testimony.

* * * * *

"There is other evidence in the record against this defendant and the testimony as a whole, if believed and accepted by the jury, is amply sufficient to support a conviction. Even so, the error in denying defendant's counsel the right to cross-examine the witness Penn and the Solicitor of the Municipal Court in the respects indicated and to argue that the facts which would have been developed thereby materially affected Penns' credibility was prejudicial error, which entitles the defendant to a new trial."

Reversals similar to the one of which we have just taken notice resulted from like errors in several of the cases which are reviewed upon preceding pages of this opinion.

Without further analysis, we express our conclusion that assignment of error three possesses merit and that it must be sustained.

The question now occurs as to whether or not the judgment of conviction should be reversed. The answer

to that inquiry must be found in ORS 138.230, which says:

> "After hearing the appeal, the court shall give judgment, without regard to the decision of questions which were in the discretion of the court below or to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

Analysis set forth in preceding paragraphs shows that the ruling which is challenged by assignment of error number three, and which we held is erroneous, was not within "the discretion of the court below." Accordingly, reversal cannot be withheld upon the phase of ORS 138.230 just quoted, but we must go on and determine whether the erroneous ruling was nothing more important than "technical errors, defects or exceptions which do not affect the substantial rights of the parties." In making that determination, we are required, so it is held in *Frangos v. Edmunds et al.*, 179 Or. 577, 173 P2d 596, to consider the entire record.

The record warrants the statement that the issue as to the defendant's guilt was a close one for the jury to determine. For example, the case was tried once before. The result of the first trial indicated by an order which recites:

> "* * * the jury reporting in open court to the Court that they are unable to agree on a verdict in this case * * * and it appearing to the Court that they have been deliberating on said case for approximately 9½ hours; and the Court being convinced from their statements that they are unable to agree

"It is hereby ordered that said jury be discharged * * *."

The inability of the jury to agree after nine and one half hours of deliberation is cogent proof that the issue as to the defendant's guilt was a close one. That very fact cautions us to view with apprehension any ruling which prevented the defendant from submitting to the jury admissible evidence.

As is manifest, Cunningham, Eldridge and Alfred Bailey were material witnesses for the state. When Alfred was called to the witness stand by the state, the district attorney asked him: "What is your address, Mr. Bailey?" and received the reply: "State Penitentiary." Before long the examination by the district attorney continued in this vein:

"Q Now, Mr. Bailey, have you entered any guilty plea to any charge brought by the State?

"A I pleaded guilty to obtaining money under false pretenses.

"Q Was that in connection with any one of these particular invoices?

"A Yes, sir.

"Q Did you receive a sentence on that charge?

"A Three years."

To that extent the state showed that Alfred Bailey had no motive to cultivate the good will of the prosecution and that he had no interest in the case except to tell the truth. In contrast to that siuation, the defendant

was prevented by an adverse ruling from probing Eldridge's motive, interest and fealty to the prosecutors.

We have observed that the authorities hold that a defendant should be permitted wide latitude in cross-examining an accomplice. We think that in this case it was especially essential that the defendant should have been permitted to pursue the course upon which he was about to enter when the erroneous ruling was made. The record reveals that Eldridge changed his testimony materially after the first trial. The following reveals one of the changes:

"Q Mr. Eldridge, you say that along about the 1st of September, 1953, Mr. Richard Bailey came back from the bank and told you that the bank was going to require evidence of shipment to accompany the Bill of Lading, is that right?

"A Someplace between the 1st and 15th, or someplace the first part of September.

"Q Well, now, you also testified, did you not, that someone said there in the presence of yourself, and Mrs. Macy, Al Bailey, Paul Cunningham, that something had to be done, and you talked it over and you figured they'd have to attach fictitious Bills of Lading to invoices; and that there was no alternative; that Dick told Al to get busy and get orders from lumber dealers and so forth?

"A Yes, sir.

"Q Did that take place?

"A That's correct.

"Q When did you think about that part of this evidence here?

MR. COTTRELL: Your Honor, I will object to that question. It's immaterial when he thought about that.

THE COURT: Objection is overruled.

"Q (By Mr. Tooze) When did you think about that part of it, about the fictitious invoices?

THE COURT: He has the right to ask the witness when he thought of it.

THE WITNESS: What was that again?

"Q (By Mr. Tooze) When did you remember about the so-called fixing up fictitious Bills of Lading and this testimony about Al to call lumber dealers and get orders, when did you think about that for the first time?

"A Oh, possibly two or three days after the last trial as to what transpired.

"Q In other words, you didn't testify to that in the first trial, did you?

"A No, I didn't."

We will shortly resort to another part of his testimony which shows still another substantial change, but before doing so will give a brief explanation to indicate the importance of the change. During Eldridge's direct examination he had described a spindle which, he claimed, stood upon Cunningham's desk and which contained "duplicates of the fictitious invoices." According to his direct examination, the spindle was in plain view and a glance at it readily revealed the number of outstanding false invoices. He swore that at times the defendant consulted the spindle for the purpose of

apprising himself of the extent to which the shipments lagged behind the advance invoicing. If he told the truth, the spindle played an important part in the operation of the fraudulent scheme. Upon cross-examination he testified:

"Q Now, when did you first remember that there was a spindle on the desk of Paul Cunningham for these slips representing the invoices that were ahead?

"A Oh, possibly a week or so, or just came to my mind as to what the spindle represented about a week or so after the last trial, and things that I didn't remember and it came to my mind and which I stated today.

"Q Did you have a meeting—did you attend a meeting at the District Attorney's office since the last trial?

"A Yes, sir.

"Q When was that?

"A Last night.

* * * * *

"Q And who was present at that meeting?

"A Last night?

"Q Yes.

"A Mr. Venn and Mr. Avrit and the other gentleman, myself, Paul Cunningham and Al Bailey, and Mr.—

"Q The Deputy Sheriff?

"A Yes."

The above shows that upon the eve of the second trial Eldridge overhauled his testimony to a major extent. The changes which he made certainly were not of the kind that can be attributed to the frailties of memory or to the inability of a witness to express himself with precision; the changes were basic. The conclusion is inescapable that he uttered under oath falsehoods upon either the first or the second trial. By reverting to Eldridge's words above quoted, it will be noticed that he did not recall, so he swore, until after the first trial the defendant's alleged participation in the inception of the fraudulent scheme. When he recalled that fact—assuming the truth of his revamped testimony—he thereby gave the state's case vital support. His belated recollection of the facts went to the very heart of the case. Likewise, he had been unable to remember, so he further swore, until his parley with the prosecuting officers that a spindle stood upon Cunningham's desk and that it held the false invoices. After his session with the prosecutors he also remembered, according to his further account, not only the spindle, but also that the defendant consulted it occasionally for the purpose of ascertaining the extent to which production lagged behind false billing. The disputed spindle and its burden of false invoices played an important part in the trial.

Memory is the most important item of man's possessions which does not improve with the passage of time; it generally deteriorates. What, then, caused Eldridge

to avow an ability, upon the second trial, to recall momentous facts which he had left unmentioned upon the first? In short, how does it happen that he made important transpositions of the facts? The situation demanded an explanation. The witness pointed to the night conference which occurred in the prosecutor's office immediately before the opening of the second trial as the fount at which his memory became refreshed. If in that office he secured his purported superior grasp of the facts, it was surely material to know whether he had been given a promise of immunity. Until the motive and the interest of this man, whatever they may have been, were disclosed to the triers of facts, a correct appraisal of the situation was impossible.

We add that Cunningham also confessed that after the first trial he made several alterations in his testimony. We have read his testimony with care; each alteration was upon a material phase of the case. In acknowledging that he made the changes, he declared that he did so after attending a session in the prosecutor's office the night before the second trial. It will be noticed that Alfred, the third witness who, like Cunningham and Eldridge, was surely an accomplice, likewise freely admitted that he altered his account of the wrongdoing. His first account, given both orally and in writing, exculpated the defendant.

It is true that the defendant's cross-examination of Cunningham and Eldridge developed the self-contradictions of which we have taken notice. Each witness

impeached himself. But a party, in his efforts to discredit a witness, is not limited to a single attack. It is evident that, notwithstanding their self-impeachment, the jury accepted as truthful the testimony given by the two men upon the second trial. That fact presents the inquiry: Would the jury have rejected the testimony given by Eldridge if the defendant had been permitted to show that no charge had been made against him and that he possessed a promise of immunity. The record submits no clear answer to that question, but it is evident that the changes in his testimony which Eldridge made following his session with the prosecuting officers may have tipped the scales sufficiently that, although the first trial had resulted in a hung jury, the second yielded a verdict of guilty. Any facts which attribute to a witness an evil motive and a self-seeking interest in the outcome of the case are material. It is reasonable to infer that, although a jury displayed a preference for testimony given in their presence upon a second trial over that given earlier before a different jury, they would have taken an opposite course had they learned that the recreant witness had bargained with the prosecutors for their own immunity.

From the foregoing we see that the erroneous rulings denied to the defendant opportunity to ascertain whether or not the prosecuting officers wielded a whip-hand over Eldridge.

The record affords no room for a belief that the jury had no alternative except to find that the defend-

ant must have known that the employes in the Eugene office were preparing false invoices and bills of lading. We shall now take note of some of the evidence which indicates that he had no knowledge of the criminal practices.

We have mentioned the fact that when the fraud came to light Alfred accepted full responsibility for what had been done and absolved the defendant. It is true that he later claimed that the defendant had persuaded him to assume the blame, but it, nevertheless, is a fact that at the outset he acknowledged guilt and acquitted the defendant. For example, in the paper which he prepared for the Mr. Gleason whom we have mentioned, he wrote with his own hand:

> "At no time during this period did I discuss what I was doing with Dick as I thought that I was helping him—I did know many of the problems that he was facing trying to put the mill on paying Basis.
>
> "At all times I fully believed that the total amount of invoicing ahead could be covered by one weeks production—In fact I was under the impression that all could be shipped in a matter of three to five days."

Cunningham acknowledged that he had told the defendant's attorney that he (Cunningham) was unaware of anything which incriminated the defendant, and Eldridge admitted that he had made a similar statement to the defendant.

From the hour when the fraud came to light the defendant consistently maintained that he knew nothing

whatever of the unlawful course of conduct. We have mentioned the fact that the state concedes that he wrote none of the false documents and that he presented none of them to the bank.

We shall review the incidents no further.

The conviction in this case rests largely upon the testimony of Alfred, Cunningham and Eldridge. All three of them, as we have seen, stand impeached through their own self-contradictions. The corroborating evidence consists largely of occasional statements which the defendant made after January 24, 1954; some, at least, are equivocal.

We are firmly convinced that it cannot be said that the defendant must have known of the fraudulent scheme which was inaugurated in the fall of 1953. A juror could reasonably believe that he was unaware of it. That being true, the error disclosed by assignment of error three must be held prejudicial.

We have mentioned only two of the thirteen assignments of error. We do not believe that the eleven which remain unmentioned disclose any substantial irregularity.

The judgment of the circuit court is reversed. The cause is remanded.

APPENDIX C

Opinion of the U. S. District Court, N.D. Cal. S.D. in Fidelity & Deposit Company of Maryland vs. Middleton and Beirne Lumber Company et al, by Wiig, District Judge.

THE COURT: Gentlemen, we seem to move from one courtroom to another, but we find each other.

I spent the entire day yesterday going over the exhibits and the law in this case, and I am going to make findings of fact based on the record. I am not going to make them as extensively as the record might call for, because I could, perhaps, review the record for an hour or two. I have tried to summarize as best I can the picture involved as the result of the complaint and the answers filed and the evidence introduced. And in that regard I will say in this case that these defendants have had an opportunity to introduce all of the evidence that they have available, perhaps with one exception, Exhibit 26, which was not received.

I make the following findings of fact. The defendants for a considerable period of time purchased lumber from the Bailey Lumber Company in substantial amounts. The normal practice consisted of the placing of an order by the purchaser, Bailey would then write up an invoice, and shipment would be made to the consignee.

The Bailey Lumber Company had arranged for a lumber invoice line of credit with the First National

Bank of Eugene in November, 1950, which credit was continued by the bank in amounts varying from $150,000 to $250,000, until it was withdrawn on January 7, 1954. The line of credit was guaranteed in writing by the corporation--that is, the Bailey Lumber Company—and the personal unlimited guarantee of its president, Richard G. Bailey, whose financial statement showed a net worth of $425,000 as of January 21, 1952, $395,000 as of January 24, 1953, and $379,065.98 as of June 30, 1953.

In the early part of 1953 Bailey Lumber Company would deliver the invoices to the bank together with assignments and the bank would loan Bailey approximately 80% of the amount as stated in the invoices, the loans being evidenced by promissory notes. Upon receipt of the lumber, consignees made their remittances to the bank, in many instances taking advantage of a 2% discount for prompt payment. The note covered by the invoice would be marked "paid" and the balance credited by the bank to Bailey's account.

Later the bank required evidence of shipment of the lumber in the form of memorandum bills of lading when delivery was made by truck. These had not always been delivered with the invoices; and solely for the purpose of reducing clerical handling of the documents, the bank in September, 1953, requested Bailey to deliver the memorandum bills of lading with the invoices.

Before and after this later date, Bailey, with the permission of certain named consignees, put into prac-

tice a system whereby invoices would be issued in advance of any planned shipment of lumber. In some instances shipment would be made and payment made to the bank. In a substantial number of cases two of the defendants, Middleton & Beirne and Westwood-Ingram, accepted checks from Bailey—and when I use "Bailey", I am referring to Bailey Lumber Company—in an amount equal to outstanding invoices, with the understanding that they would send their own checks in like amounts to the bank in payment for the same. This "paper" transaction cleared the records for all concerned.

Obviously, the consignees were aware of the fact that the bank had loaned money to Bailey on the fictitious documents presented to it. These two defendants, Middlestone & Beirne and Westwood-Ingram, stated that their reasons for cooperating with Bailey in this exchange of checks were to help Bailey Lumber Company through a "trying period" and to "get rid of the fictitious invoices." Neither received any money or other considerations in return for their participation in the advance invoicing program.

During this period of advance invoicing, shipments of lumber were being made by Bailey to the Defendants in substantial quantities, in accordance with regular business procedure previously outlined. However, after the bank required memorandum bills of lading to accompany invoices before loans would be made, Bailey resorted to a practice of forging bills of lading for the

purpose of deceiving the bank. As a result of this practice, the bank loaned a substantial amount of money to Bailey on the forged bills of lading and accompanying invoices. None of the defendants was aware of this criminality by Bailey.

When this fraud was discovered, the end of December, 1953, the bank had on hand notes in excess of $150,000 which were valueless because Bailey Lumber Company was insolvent. The bubble broke following an investigation started by the bank on the basis of a letter from the defendant Ed Fountain Company to the effect that it had not received 44 truck and trailer shipments of lumber for which the bank had sent a remittance report. And of course the evidence shows the results of that investigation.

The plaintiff, under its fidelity bond, paid the bank the sum of $158,129.55 for "loss sustained as a result of extension of credit to the Bailey Lumber Company, Inc., Eugene, Oregon, on notes supported by fictitious invoices and trucker bills of lading bearing forged or counterfeit signatures." The bank's rights and claims with respect to loss were assigned to the plaintiff by instrument dated April 19, 1954.

Plaintiff predicates its claim against these defendants on the theory that they not only consented to Bailey issuing invoices where no lumber was shipped, but agreed to and did cooperate with Bailey in concealing that information from the bank, and thereby lulled it into a

feeling of security to the extent that it continued to loan money on the security of similar invoices.

Plaintiff further urges that the bank, in making its loans, was not relying upon the credit of Bailey, but was relying upon the credit of the purchasers and consignees.

The defendants have moved for judgment of dismissal in their favor after the plaintiff rested, the grounds of the motion being set forth in the record.

Except for the generally-accepted principles, the cases cited by counsel for the parties are of little help. Yet it is well known that to prove fraud the evidence must be clear and convincing.

The persons and corporation responsible for the bank's loss are not parties to this lawsuit.

The actions of the bank, through its officers and employees during the period in question, are important insofar as they relate to the contention that the bank relied on the credit of the defendants and not on the Bailey Lumber Company. No greater reliance was placed on the credit of these defendants than on any other consignees in this class of credit. Routine investigations of the credit and standing of the consignees and purchasers were made by the bank. Routine procedure was followed in the processing of invoices, bills of lading, promissory notes, payments, deposits and bank entries covering hundreds of transactions concerning the normal sale of lumber by Bailey to the defendants. Departure

from the normal procedures as the result of fictitious invoicing and the check exchange practice may be fraudulent under the circumstances set out in Peskin against Squires, 319 Pac. 2d at page 405. Here, however, a departure from the normal is placed in an entirely different setting.

On all the facts as shown by the record in this case,—I have not emphasized at all the negligence of the bank but I am deciding this case on the normal practice of the bank because negligence would not be a defense. But from all the evidence in this case, I find that the plaintiff has failed to sustain the allegations in its complaint by clear and convincing evidence that the defendants or any of them are guilty of fraud. The motions for judgment of dismissal as to the defendants will be granted.

And I say, gentlemen, counsel for the defendants especially, if you wish to submit supplementary findings of fact which are shown by the evidence, there is no conflict in the evidence to speak of—which will further support your position, you may do so. Otherwise, the findings of fact as I have just stated them will be the findings of fact and conclusions of law of the Court.

MR. DAVIS: Pardon me. Do I understand that the findings which Your Honor has just announced will be transcribed by the reporter and signed by Your Honor as findings?

THE COURT: If that is the desire of counsel, it can be done.

MR. DAVIS: Well, I would prefer it be done, that we know definitely on what ground the Court has made his order. And I would appreciate if you would let me have an extra copy of the statement of the Court as early as possible, please.

MR. ROBINSON: If Your Honor please, I think all defendants would appreciate copies of the findings as announced, but I am sure that I can speak for all of us: We would like to collaborate to present for your consideration supplemental findings supported by the evidence.

THE COURT: I think it would be desirable, Mr. Robinson. As I say, I could sit here for an hour or two and just review the entire evidence. What I have attempted to do is summarize it; and in my summary and in consideration of all of the evidence, I am satisfied that the plaintiff has not carried out its burden of proof to show by convincing evidence the evidence is quite clear, but I am not convinced from it that the defendants or any of them are guilty of fraud or the charges contained in the complaint.

APPENDIX D

28 USCA 753, REPORTERS * * * (b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall specifically agree to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceedings. * * *

18 USCA 2, PRINCIPALS (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

28 USCA 2111, HARMLESS ERROR. On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

18 USCA 371, CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES. If two or more persons

conspire either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *

18 USCA 1341, FRAUDS AND SWINDLES. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

APPENDIX E

Judgment in District Court as to Richard G. Bailey:

* * * It is adjudged that the defendant is guilty as charged and convicted. It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four Years on each of Counts I to VIII, inclusive, and for a period of Four Years on each of Counts X to XXVII, inclusive; that said periods of imprisonment run concurrently, a total period of Four Years imprisonment.

Judgment in District Court as to Laurel Macy and Norman G. Eggimann:

* * * It is adjudged that the defendant is guilty as charged and convicted. It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Six Months for the offense charged in Count I of the said indictment, and, that as to each offense charged in Counts II to VIII, inclusive, and Counts X to XXVII, inclusive, the imposition of sentence is suspended and the defendant released from custody on probation for the period of Three Years; that said period of probation run concurrently with each other and consecutively with the term of imprisonment imposed this day for the offense charged in Count I of the said indictment, a total sentence of Six Months imprisonment and Three Years Probation.

Judgment in Court of Appeals, as to all defendants:

On consideration whereof, it is now here ordered and adjudged by this Court that the Judgment of the said District Court in this cause be, and hereby is affirmed.

LE COPY

Office Supreme Court, U.S.
FILED
FEB 15 1961
JAMES R. BROWNING, Clerk

No. 651

In the Supreme Court of the United States

OCTOBER TERM, 1960

RICHARD G. BAILEY, NORMAN R. EGGIMANN AND LAUREL MACY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 11-24) is reported at 282 F.2d 421.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1960. A petition for rehearing was denied as to petitioner Bailey on November 21, 1960, and as to petitioners Eggimann and Macy on December 16, 1960. On December 13, 1960, Mr. Justice

Douglas extended the time for filing a petition for a writ of certiorari on behalf of petitioner Bailey to and including January 20, 1961. The petition for a writ of certiorari on behalf of the three petitioners was filed on January 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the finding of the district court that the transcript of the trial did not omit any relevant portions of the proceedings.

2. Whether the evidence supported the convictions of petitioners Eggimann and Macy as aiders and abettors of the fraudulent scheme.

3. Whether the trial court erred in refusing to instruct, or to allow petitioners' counsel to argue to the jury, that petitioner Bailey could not compel his co-defendants to testify on his behalf.

STATUTES INVOLVED

28 U.S.C. 753(b) provides in pertinent part:

> One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; * * *.
>
> * * * * *

18 U.S.C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtain-

ing money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

The indictment returned in the United States District Court for Oregon consisted of twenty-six counts charging mail fraud and a further count charging

conspiracy (I-R. 1-10). The three petitioners were found guilty on all counts. Petitioner Bailey was sentenced to imprisonment for four years on each count, the sentences to be concurrent. Petitioners Eggimann and Macy were sentenced to imprisonment for six months on count 1 and placed on probation for three years on the other counts, to commence upon completion of the term of imprisonment (I-R. 76-92; Pet. 11).[1]

The facts may be summarized as follows:

The indictment was based on the operations of the Bailey Lumber Company (hereinafter referred to as the "company") which engaged in lumber brokerage. Petitioner Bailey owned slightly less than half of the company and was its active manager (IV-R. 778-779). Petitioners Eggimann and Macy were the company's accountant and bookkeeper, respectively.

In 1953, petitioner Bailey acquired an interest in a lumber mill located at Willow Creek, California (referred to as the "mill"). The company sold the mill's product and, where necessary to keep the mill in operation, assumed its expenses (IV-R. 780-781; V-R. 882, 883). The equipment of the mill needed modernizing in order to operate at a profit. The cost of this equipment, together with a decline in the market price of the mill's product, caused the company to be short of funds to buy lumber from other mills, so that its operation became restricted to

[1] Of the five other persons charged in the indictment, three pleaded guilty and two were acquitted.

selling the product of the mill (II-R. 195; V-R. 895-896).

Approximately eighty percent of the company's credit sales were financed through the First National Bank of Eugene, Oregon (Pet. 12). For the purpose of drawing on this line of credit, invoices of lumber shipped and other documents, such as bills of lading or inspection certificates, would be presented to the bank. In 1953, when the company was having difficulty in meeting the expenses of the mill, it began an extensive practice of invoicing sales of lumber in advance of their actual shipment. These invoices, together with fictitious bills of lading, would be used as a basis for credit at the bank (II-R. 153-155, 280, 281; III-R. 370). The hope was that the modern equipment being installed at the mill would increase production to an extent which would make it possible to meet all obligations (II-R. 25). However, this expectation was not realized. Many of the shipments of lumber invoiced in advance were never actually made. Customers were, however, persuaded to make payments to the bank even though they had not received the shipments, and the company reimbursed the customers by its own checks (II-R. 30-32).

In the meantime, similar lines of credit had been established with two other banks (II-R. 43; III-R. 491-497). The financing of fictitious transactions by further fictitious transactions finally terminated when a customer notified the bank at Eugene that he had not received the lumber represented by the company's invoices (II-R. 44). A bank investigation then took place, which resulted in the bankruptcy of

both the lumber company and the mill. The amount of fictitious transactions was in excess of $172,000 (III-R. 307).

ARGUMENT

1. There was no substantial defect in the transcript of the trial. When this point was raised by motion in the court of appeals, a hearing before the district court was ordered to determine whether there were any omissions in the transcript (Pet. 23). Upon such hearing, the court reporter testified that he had made a complete search of his stenographic notes on the trial and had found two places where he had placed a symbol indicating discussion off the record. He testified that these discussions were between counsel and were not part of the trial. They amounted to a few words, uttered in a low tone of voice which the reporter could hear, but which meant nothing to him (VI-R. 13-16). They did not involve any questions to witnesses, objections, motions, or rulings of the court (VI-R. 13-14). The places where the omission occurred appear in the transcript at pages 176 and 299, respectively (VI-R. 14-15).[2]

The indicated portions of the transcript support the reporter's recollection. The first omission fol-

[2] The reporter testified that there was also a discussion off the record during the course of argument to the jury, but this was not in issue because neither party asked that the argument of counsel be included in the transcript (VI-R. 10-11).

The district court indicated that there were four omissions (VI-R.1). The other two omissions were apparently based on the testimony of petitioner's counsel (see *infra*, p. 7, note 3).

lowed a colloquy between counsel as to the apparent identity of two government exhibits, 200-A and 200-B, a matter patently lacking in any possible significance either to the trial or the appeal. The second such omission came during a colloquy between counsel as to the wording of a question, following which the question was reworded and the witness permitted to answer, over government objection. Since the question was answered, it is obvious that nothing could have occurred to prejudice petitioners' rights.[3]

On the basis of the hearing, the district court properly held that nothing relevant had been omitted from the record (VI-R. 1-2). Nothing was omitted which affected the substantial rights of the parties.

2. There was ample proof that petitioners Eggimann and Macy aided and abetted the commission of the offense. Eggimann, as accountant for the company, set up the special account whereby the check

---

[3] Counsel for petitioner Bailey was unable to add anything of significance to the testimony of the reporter. He testified: (a) On a few occasions, he thought the court had told him to hurry up (VI-R. 23); (b) he thought that the record was incomplete concerning his objection to the court's refusal to instruct that Bailey could not call his codefendants as witnesses (VI-R. 22); however, the record abundantly shows that this request was made and denied, and the government makes no contention that the point was insufficiently raised (see *infra*, pp. 8-10; I-R. 73-74, 47); (c) there was a delay, not shown in the transcript, in having a government witness testify, but counsel admitted that he had agreed to this; moreover, this issue was considered as in the record on appeal (VI-R. 25-27). Counsel testified that he knew of no questions, exceptions, or motions which were unrecorded (VI-R. 23-24) or any other omission than those stated above (VI-R. 29).

kiting arrangement of sending company checks to customers to reimburse customers paying the bank, supported by further borrowing from the bank on fictitious purchases, was handled (II-R. 289). Petitioner Macy, the bookkeeper, played a subordinate but definite role in the execution of the scheme. She would receive calls from petitioner Bailey at the mill as to the amount needed to meet the expenses there. She would pass this information on to Bailey's brother, who was temporarily managing the lumber company, and ask him to prepare a note to the bank to cover such amount. She would then participate in writing the fictitious invoices (II-R. 27-28, 159, 164, 197). She fully understood the fraudulent nature of the operation (II-R. 218-219, 243).

This conduct constituted aiding and abetting the commission of the offense. See *Jin Fuey Moy* v. *United States*, 254 U.S. 189; *United States* v. *Peoni*, 100 F. 2d 401 (C.A. 2). It was not necessary to show that these petitioners actually mailed the fraudulent invoices or bills of lading, so long as the use of the mails was within the contemplation of the scheme and the mailings were in execution of the fraud. *Pereira* v. *United States*, 347 U.S. 1, 8; *Parr* v. *United States*, 363 U.S. 370, 390-391.

3. Immediately prior to his argument to the jury, counsel for petitioner Bailey asked the court to be allowed to advise the jury that this defendant was prohibited by law from calling the petitioners Laurel Macy and Norman Eggimann as witnesses on behalf of himself. On objection by counsel for petitioners

Macy and Eggimann, the court ruled that such comment by counsel for petitioner Bailey would not be permitted (I-R. 47). The court also rejected a request by petitioner Bailey for an instruction to the same effect (I-R. 73-74). Instead, the court instructed the jury that the law does not compel a defendant to take the witness stand and testify and that no adverse inference should be drawn from any failure to do so (V-R. 1002).

The action of the court was proper. There was no reason for any comment on the failure of petitioner Bailey to call the co-defendants to the stand, since no one had suggested that any adverse inferences should be drawn by the jury from such failure.[4] See *Egan* v. *United States*, 287 Fed. 958 (C.A. D.C.). The comment which counsel wished to make was not wholly accurate since Bailey could have called the co-defendants but could not have compelled them to testify.[5] The net effect of the proposed comment would have been to call the attention of the jury to the failure of the two co-defendants to take the stand and therefore would have been prejudicial to them.

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[4] The petition misconstrues the government's brief in the court below when it states (Pet. 6, 9) that the government admitted an unfavorable inference would be drawn by the jury. The government's brief stated that the court's charge as given "was in aid of defendant Bailey's position since it made no mention of any presumption against him for failing to call a witness within his power to produce."

[5] It should be noted that Bailey had made no showing that he did in fact try to call the co-defendants and that they refused to testify.

As the court of appeals pointed out (Pet. 22), the judge's charge as given avoided this difficulty, but at the same time made clear that the co-defendants could not have been compelled to testify.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1961.

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In The

Supreme Court of the United States

OCTOBER TERM, 1960

No. 651

RICHARD G. BAILEY, NORMAN R. EGGIMANN, LAUREL MACY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Additional Statute

"*18 USCA 3481.* Competence of Accused.

"In trial of all persons charged with the commission of offenses against the United States * * * the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

REPLY TO GOVERNMENT'S OPPOSITION

1. The understandable unfamiliarity of the Solicitor General with this extensive record has led to erroneous views.

Besides the two "off the record" symbols, R. Vol. II, p. 176, Vol. III, p. 299, which the court reporter admitted, R. Vol. VI, p. 7, 8, it was shown there were two more, R. Vol. VI, p. 33, 42, one of which was at R. Vol. II, p. 33, but the other had been omitted by him in transcribing the record at R. Vol. I, p. 73, 74, along with another line, R. Vol. VI, p. 42, 43, for an unexplained reason. (The copying error suggested by the U. S. Attorney was unfounded. R. Vol. VI, p. 44.) The contents of these, the court reporter could not explain. R. Vol. VI, p. 7, 8.

The court reporter had admitted that his failures to record included discussions of law between court and counsel. R. Vol. VI, p. 46. Further it was shown that he had omitted recording matters without a "discussion" symbol to indicate their absence. R. Vol. VI, p. 14. Some of these were recalled by defense counsel and the trial judge, were made part of the record on appeal, R. Vol. I, p. 46, 47, and were important on two assignments of error on appeal.

The reason why defense counsel cannot recall more of the probable omissions is that the enforced pace of the trial to end it in time for the trial judge's plane trip, R. Vol I, p. 46-48, Vol. II, p. 107, exhausted and confused new defense counsel, Vol. III, p. 375, Vol. IV, p. 644, 645, 654, 656, 669, 670, 672, 751, Vol. V, p. 18, 20, 38. This is just the type material the court reporter considered "off the record" but exactly the type material to occasion a reversal. *People v. Becker*, 210 NY 274, 311, 312.

104 NE 396, 409, 410; *Regina v. Busby*, Eng. Ct. Crim. Appeal dec Jan. 18, 1960.

The basis upon which the District Court and Court of Appeals decided this matter was that the burden was on petitioner to show what was omitted and that the omissions prejudiced his appeal. Petitioner could not and did not sustain this burden, and still believes the burden should be the government's to show he was not prejudiced.

2. The government too quickly slips over this point. The question is does our "principles" statute, *18 USCA* 2, extend criminality to those who would not be guilty of the crime at common law either as principals or accessories before the fact?

The verb in the statute denotes the crime. In mail fraud, it is "mails," in conspiracy "conspires" (agrees). A common law principal in the first degree was the person who actually mailed the letter or agreed to commit the crime. Macy and Eggiman did neither. A common law principal in the second degree was present at the scene of the crime as the principal in the first degree mailed or agreed, aiding or abetting (encouraging) such principal in mailing or agreement. Macy and Eggiman were not present to do this. A common law accessory before the fact was absent from the mailing or agreeing, but counselled, commanded, induced, procured or encouraged (abetted) the principals to do the mailing or agreeing. Macy and Eggiman were absent, but in no way counselled, commanded, etc., the com-

mission of his crime. The government claims they "aided" but aiding has never been enough at common law to make an accessory before the fact. What they did would not make them guilty as common law principals or accesories before the fact. Has the statute changed this?

The cases cited by the government do not sustain its position. In *Jin Fuey Moy* the defendant doctor by the use of a prescription he issued procured a sale of narcotics by his druggist confederate. The court specifically found not only that defendant aided but that he procured and abetted (encouraged) the unlawful sale. *Jin Foey Moy v. U. S.*, 254 US 189, 194. This conduct would have made him a common law accessory before the fact.

In *Peoni*, the whole discussion in the opinion is contrary to the government's position and might be characterized by the one sentence therein:

> "all the words used—even the most colorless 'abet' —carry an implication of purposive attitude towards it." *U. S. v. Peoni*, 2 Cir 100 F 2d 401, 402.

which was lacking in Macy and Eggiman. Appendix A, p. 14 ,15.

The *Pereira* and *Parr* cases do not assist since the point for which the government cites them has not been denied by petitioners. Petitioners concede they may be guilty of mail fraud even though they did not by their own hands actually mail the documents if they did come

within the confines of the "principles" statute, *18 USCA 2.*

Is a person who has given incidental aid to the principal but who would not be an accessory before the fact, now guilty of crime? In the Ninth Circuit, clearly yes; in the Sixth Circuit, clearly no; in the Second Circuit, probably not. The government obviously intends to treat all such persons as guilty. This ever recurring fundamental question of guilt would appear to merit consideration.

3. In the Court of Appeals the government claimed that the co-defendants Macy and Eggiman were competent witnesses for defendant Bailey, that Bailey should have called them to the stand, attempted to question them and forced them to claim privilege, and his failure to do so created an inference against him.

> "However, Laurel Macy was not an incompetent witness * * *. Nor does the record disclose any attempt upon the part of Richard G. Bailey to produce her as a witness in his behalf. * * * it should be noted that Richard Bailey could not complain in any event that Laurel Macy's testimony was unavailable to him." Govt. Br. Ct. of Appeals, p. 30.
>
> "Appellants contend the court should have given an instruction to the effect that no inference could be drawn from defendant Richard Bailey's failure to call co-defendants as witnesses. Appellants apparently base this contention upon their mistaken belief that the co-defendants were incompetent witnesses (Cf. Appellants' Fifth Assignment of Error and appellee's discussion thereof, supra), but defendants were competent witnesses either in their

own behalf or on the behalf of co-defendants. * * * Defendant Bailey elected not to call his co-defendants in his behalf and therefore made no record which would indicate their refusal to waive their privilege." Govt. Br. Ct. of Appeals, p. 33.

"* * * the charge as given was in aid of defendant Bailey's position since it made no mention of any presumption against him for failing to call a witness within his power to produce. *Ford v. U. S.* 5 Cir 1954, 210 F 2d 313; cf *Papalia v. U. S.* 5 Cir 1957, 243 F 2d 437, 441; *Fogarty v. U. S.* 5 Cir 1959, 263 F 2d 201, 205, 206. Bailey's co-defendants, Laurel Macy and Norman Eggiman, made a vital choice of legal strategy in choosing not to take the witness stand in their own defense. That rules of evidence such as this sometimes appear to operate against individual defendants charged as co-conspirators should not now be available to a defendant as a means of defeating an otherwise clearly substantial conviction." Govt. Br. Ct. of Appeals, p. 34.

The Solicitor General's brief in this court agrees that Bailey should have called the co-defendants to the witness stand and made them claim privilege but asserts the government brief below did not state an inference unfavorable to Bailey resulted. Sol. Gen. Br., p. 9. This is erroneous for the cases cited by the government in the above section of its brief in the Court of Appeals are all to the effect that an inference exists against a defendant for his failure to produce an available and apparently favorable witness.

It should be noted that in the trial court, neither the judge nor the U. S. Attorney suggested that the co-defendants were competent witnesses or that Bailey

should call them to the witness stand and make them claim privilege or that no unfavorable inference would result. R. Vol. I, p. 73, 74, 47.

The authorities on this are against the government. *18 USCA 3481* makes a defendant a competent witness for a co-defendant only at his own request.

> "This act renders any of the pluralty of defendants on trial competent to testify either in his own behalf, or on behalf of any co-defendant or the government, provided only that he testified at his own request." *Heitler v. U. S.*, 7 Cir., 44 Fed 140, 141.
>
> *Wolfson v. U. S.*, 5 Cir., 101 Fed 430, 436.

The Third Circuit has ruled, contrary to the government's position, that a defendant's calling of a co-defendant to the stand as a witness, without the request of that co-defendant, requires a mistrial as to the co-defendant so called. *U. S. v. Housing Foundation of America, Inc.*, 3 Cir., 176 F2d 665.

Petitioner is unable to see how solicitude for the co-defendants precludes clearing advising the jury that Bailey was forbidden by law from calling these obviously friendly people who could support his defense and that the jury should not make an inference therefrom adverse to Bailey. Nor can he see why his counsel was not permitted to argue to the jury that no such inference should result. R. Vol. I, p. 47, 73, 74. On this it would appear that the case cited by the government, *Egan v. U. S.*, D. C. Cir., 287 Fed 958, 969, 970 is against its position because defense counsel did suggest the inference and

the court failed clearly to instruct against whom it should or should not be drawn.

In any event, this matter should be definitely determined.

CONCLUSION

For the reasons stated in the petition and reply submitted that a writ of certiorari should be granted.

Respectfully submitted,

HOWARD R. LONERGAN,
Counsel for Petitioners.

February 21, 1961.